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Downs investments Pty Ltd (in liq) V. Perwaja steel SDN BHD [2002] 2 Qd R 462

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Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD [2002] 2 Qd R 462

Editorial Remarks

Dr. Bruno Zeller

This is an appeal from the Supreme Court of Queensland.¹ The issue in brief was whether the remedies for a breach of contract were properly determined. Furthermore the application of the principle of fundamental breach was also questioned. As such the pertinent principles in articles 74 and 75 as well as articles 63 and 64(1) of the CISG were considered..

From the outset two observations can be made. First of the 44 cited cases only two *Delchi Carrier SpA v Rotorex Corp*² and *Roder Zelt- und Hallenbaukonstruktionen GmbH v Rosedown Park Pty Ltd (in liq)*³ had any connection to the CISG. The remainder were only relevant in domestic matters.

Secondly towards the end of the original trial the procedural law changed in Queensland. . Previously a party was only required to state the facts and could rely on the legal consequences which “properly flowed from the material facts pleaded.”⁴ The change brought about by the Uniform Civil Procedure Rules was that a party was obliged “if a claim or defense under the Act is relied on” to identify the specific provisions under the Act.⁵ The problem, and a cause of the appeal, was that 44 days after close of the original trial the judge called the parties together to inform them that the CISG emerged as the applicable law. Arguably the judge should and could have advised the parties as soon as the change became apparent to amend their pleadings or simply call for a new trial. The change of the Rules entered into force after the trial commenced but before it finished.

Of particular interest in this case is not the judgment itself but the arguments of counsel for the appellant as well as the respondent. The arguments displayed a lack of understanding of the CISG and its implications. It should be clear from the beginning that by merely touching upon two relevant CISG cases a real understanding of the CISG has been achieved. This was an opportunity and an invitation to consider the CISG properly and unfortunately the challenge was not taken up.

Appellants Arguments

Counsel for the appellant contended that in the original case the claim had been framed on “the basis that the correct measure of loss was as set out in s51 of the domestic Sale of Goods Act.”⁶ As a consequence it was pleaded that the respondent

¹ For the initial case see *Downs Investment Pty Ltd v Perwaja Steel SDN BHD* [2000] QSC 421 (17 November 2000)

² 71 F 3d 1024 (2nd Cir 1995)

³ (1995) 57 FCR 216

⁴ *Downs investments Pty Ltd v Perwaja Steel* [2002] 2 Qd R 462, at 472.

⁵ *Ibid* aee R149(e) at 472.

⁶ *Downs investments* at 463.

should be estopped from relying upon the CISG.⁷ Both these arguments are extraordinary. First if the pleading was based on the Sale of Goods Act then the appellant ought to have urged the court to ask the plaintiff to redraw its claims. Secondly the principle as discussed in *Perry Engineering*⁸ should have been applied where under similar circumstance the master rejected a claim and noted that “this seems to me to be fatal to the plaintiff’s ability to proceed to judgment ...”⁹.

Instead the appellant argues estoppel, The question of course is since when can a respondent be estopped from pleading the appropriate law? It should have been abundantly clear at least at the appeal stage that the CISG is the governing law to the exclusion of the Sale of Goods Act.

The appellant is correct in suggesting that the trial judge erred by deciding the case on a different basis as from those disclosed by the pleadings. However the appeal should have been made on grounds of denial of justice, which arguably were considered in allowing this appeal and not on grounds of an application of the wrong law.

The effect as mentioned above should have been that the pleadings are to be redrawn or the matter is listed again. However the appellant does not have this outcome in mind. They simply contend that the respondent was not entitled to a judgment based on the convention and that “there is no injustice in holding a party to that fundamental principle of pleading.”¹⁰ The point is that the appellant by quoting domestic law assumes the position that the Sale of Goods Act is the proper law whereas it is not. There is indeed injustice if any party would be estopped from pleading the proper and only applicable law.

The argument that the trial judge failed to give proper regard to article 63 when determining whether a fundamental breach occurred is a valid though weak point. Interestingly enough counsel argued that the trial judge applied article 64(1) in a flawed fashion as “reference was made which would satisfy the common law doctrine of repudiation.”¹¹ The fact is that neither counsel understood the application of the CISG fully and hence such a remark is rather strange. The point is that article 63 is discretionary in character and does not need to be invoked. If the plaintiff believes that a fundamental breach has occurred, and the court accepts that argument, article 63 does not need to be relied on. Even a cursory investigation of academic writing on this point would have clarified this matter.

The most interesting argument is that the appellant contended that articles 75 and 74 were wrongly applied. In relation to article 75 it was contended that the purpose of this article only involves the resale of goods which were the subject of the contract and not any other goods. This appears to be a novel approach in interpreting article 75 and more to the point no case law or academic writing was offered in support of such a contention. Indeed one would be hard pressed to find any interpretation of article 75 to support such a contention.

⁷ Downs at 464.

⁸ *Perry Eng P/L (Rec and Man Appt'd) v Bernold AG* No. SCGRG-99-1063 [2001] SASC 15 (1 February 2001)

⁹ Ibid.

¹⁰ ibid at 464.

¹¹ ibid at 465.

It was further argued that the trial judge ignored the plain meaning of article 74 and overcompensated the respondent “in a manner which would not have been countenanced by the common law.”¹² Counsel supported the contention by relying on several municipal judgments. Again as noted previously article 7 of the CISG specifically noted that regard has to be had to the international character of the convention. This has been interpreted as meaning that recourse to domestic law is not allowed. It is a hallmark of this case that both counsel have not taken note of article 7 otherwise arguments such as the above would not have been contemplated.

Furthermore the appellant stated that there is a conceptual difficulty in relying on article 74 as well as article 75:

“The difficulty is that under art 74 the respondent must invite the court to assume that it would have recovered its expenses in performing the contract in circumstances where it is also asking the court to award a form of expectation loss under art 75 or art 76.”¹³

Predictably this assertion was backed up by municipal law in contravention of article 7 of the CISG. It is obvious that article 75 and 76 are to be consulted in this instance as the respondent claimed fundamental breach. Equally well it should have been understood that the respondent has not lost any additional rights under article 74 by relying on either article 75 and 76. The wording of article 74 as well as academic writing and jurisprudence makes it abundantly clear that article 74 cannot be used to enrich the plaintiff. It can be used to claim those damages which are not recoverable under article 75 and 76.

Respondents arguments

Not surprisingly the respondent also did not distinguish between action under the CISG and common law and noted that a termination of the contract was justified “whether one applied the Convention or the common law.”¹⁴ Such a contention is wrong as only the convention is applicable to the exclusion of the common law. Furthermore counsel still persisted in arguing that they were not required to “plead the legal consequences which flow from a breach [and hence] it is not a claim under the Convention [which] merely codifies the law of contract to be applied.”¹⁵ Such comments are not in line with article 7. Interestingly though at a later stage counsel for the respondent did make a comment which reflects the meaning of article 7 by noting that:

“the convention specifically requires interpretation by member states in a manner which promotes uniformity in application.”¹⁶

¹² *ibid* 467.

¹³ *ibid*.

¹⁴ *ibid* 468.

¹⁵ *ibid* 469.

¹⁶ *ibid* 471.

Such a claim sounds rather hollow considering that domestic legislation and jurisprudence has been quoted to support the respondent's arguments. Also if counsel would have understood the ramifications of article 7 then a statement that article 74 reflects the common law as stated in *Hadley v Baxendale* (1854) 9 Ex. 341 would not have been made.

Furthermore *Delchi Carrier SpA v Rotorex* was quoted. It is ironic that the only case which was relied upon is noted by many scholars as an example where the court could not overcome its ethnocentric interests. A. Kritzer in his editorial noted specific instances and one note is sufficient to illustrate the problems. The court's syllogism, he notes, was as an example the reasoning that:

"[c]ase law interpreting analogous provisions of Article 2 of the Uniform Commercial Code ('UCC') may also inform where the language of the relevant CISG provisions tracks that of the UCC";¹⁷

In sum it can be argued that counsel for both parties did not use the CISG in its intended form and neglected to construct their arguments with article 7 firmly in their sights.

The Courts Decision

From a practical point of view the CISG will apply whatsoever and absent the delayed introduction of the CISG by Ambrose J in the original trial none of the arguments would amount to any meaningful justification of an appeal

Also it appears that the way this matter has been argued the lessons from the original judgment have not been learned. It is not surprising that the court rejected the appeal. Interestingly the appellant did admit that prior to the trial the CISG was considered but "had been put back on the shelf because it wasn't relevant to the case."¹⁸ This appeared to be a fatal error and the consequences are exposed in this appeal. The court did look at the appropriate facts in deciding the relevance of article 63 and noted that it was not relevant as the appellant was already in fundamental breach. Unfortunately the court did not explain the relationship between articles 64 and 25 to come their conclusion.

The problem again is that the court also did justify their reasoning by reverting to domestic jurisprudence and equated a fundamental breach with a rescission of the contract. Furthermore the court rejected the appellant's contention that the judge used the term of "repudiation" in his judgment by arguing that it is clear that the CISG "adopts to some extent the common law concept of repudiation."¹⁹ This again is taking the wrong view. Arguably it could be that the outcome of a repudiation may arrive at the same result as an application of fundamental breach under the CISG. However to argue that the outcomes are the same therefore the concept must be the same is not correct. The treatment of fundamental breach is unique. It is a "fresh legal concept ... [and] ... has no parentage in other jurisdictions".²⁰

¹⁷ See <http://www.cisg.law.pace.edu/cisg/wais/db/editorial/951206u1editorial.html#damages2>

¹⁸ Downs Investment above n4, at 475.

¹⁹ *ibid* at 481.

²⁰ Will, M in Bianca & Bonell (ed) *Commentary on the International Sales Law*, (1987) Milan, at 210

It must be noted that the court did discuss the issues and surprisingly did come to the correct conclusion however without as one would expect consulting academic writing and foreign judgments.